Submission No 10

INQUIRY INTO ADMINISTRATION OF THE 2007 NSW ELECTION AND RELATED MATTERS

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The Conduct of the 2007 New South Wales Election

Submission to the Joint Standing Committee on Electoral Matters
Parliament of New South Wales

By

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Preliminary Remarks

In this submission, I wish to address three matters that concerned me in the conduct of the 2007 New South Wales election. These are:

- The registration of how-to-vote material, and particularly the secrecy over access to this material once registered;
- Problems with the preference counts released by the Electoral Commission in the fortnight after the election; and
- The timing of the issue of the election writ.

Registration of How-to-vote Material and the Secrecy Provisions of Section 151G (12A)

In paragraph 3.89 of its report on the 2003 election, the Joint Standing Committee on Electoral Matters quoted my submission on problems with the NSW procedures for registering how-to-vote material. In the quote. I made reference to the public access available to registered how-to-vote material under the Victorian and Queensland Electoral Acts

The Committee then recommended “That all election material, such as how-to-vote cards, that are registered with the Electoral Commissioner be available to the public upon request on election day." (Recommendation 12)

It is unfair that the Committee should have used my quote as justification for this recommendation. I clearly stated that I saw no reason why this material should be secret ahead of election day. The committee then recommended that the material only be available on election day.

Even worse, the Government further restricted access while claiming to be implementing the Committee's recommendation. In his second reading speech for the Parliamentary Electorates and Elections Amendment Bill (2006), the Parliamentary Secretary Mr Graham West stated in his speech:

"Currently there is nothing in the Act that compels returning officers to make registered material available for inspection. The bill improves transparency by providing that all registered material proposed to be distributed in electorates must be available for inspection on election day at the office of the returning officer. The registered material may be requested by any scrutineer or by any person enrolled in that electorate. These reforms implement the recommendation of the Joint Standing Committee on Electoral Matters that all registered material should be available on election day." (Legislative Assembly Hansard, 30 August 2006)

The provision as implemented in Section 151G (12A) reads:

> *A copy of:*
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> *(a) electoral material registered under this section for a district, and*
> *(b) the relevant certificate of registration,*
>
> *must be available for inspection, at the office of the returning officer for the district during the hours of polling on polling day, and on all days to which the polling is adjourned, at the request of any persons enrolled for the district or of any scrutineer.*

The statement that this improves 'transparency' is one of which George Orwell would be proud. Under the legislation, how-to-vote material must be registered centrally eight days ahead of the election, after which it is distributed to Returning Officers who further distribute it to polling place managers. The material could be made available centrally, where it would be of most use to the media and all political parties, except that the Act prevents access. The material could be made available to voters and scrutineers in polling places where it would be of most use, except that the Act does not allow access. Instead, material is only available in the office of Returning Officers, and on polling day with limited access, where it is of least use.

Under this provision, the 2007 election was the first occasion on which I was prevented from having access to how-to-vote material. At previous elections I had been able to view all registered how-to-vote material in the head office of the Electoral Commission on election day. At the 2007 election, the only access I was allowed was as a registered voter in the Electorate of Marrickville. Section 151G (12A) permitted me access to registered material for the electorate of Marrickville and for the Legislative Council. This access was only permitted in the office of the Returning Officer.

I compare this situation with my experience in both Victoria and Queensland where, despite not being permitted to vote, I was readily allowed access to registered material ahead of election day. The provision for public access under both state's Electoral Acts are quite straight forward.

The Victorian Electoral Act (Section 82) states:

> *82. How-to-vote cards available for inspection*
>
> *As soon as practicable after registering a how-to-vote card under section 79 or 80, the Commission must make available a copy of that card for inspection at the office of the Commission.*

The Queensland Electoral Act (Section 161B) even permits access in polling places.

> *(4) Before polling day, the commission must make a how-to-vote card that it has not rejected available for public inspection for free at--*
>
> *(a) the commission's Brisbane office; and*
>
> *(b) if the how-to-vote card was printed for a candidate--the office of the returning officer for the electoral district being contested by the candidate.*
>
> *(5) On polling day, if the how-to-vote card relates to only 1 electoral district, the commission or returning officer for the district must, to the extent that it is reasonably practicable to do so, make the card available for public inspection for free at each polling place in the district.*
>
> *(6) An election is not invalid only because the commission does not comply with subsection (4) or (5).*

I would recommend that the NSW Act be amended to reflect the situation in Victoria and Queensland.

The Parliamentary Electorates and Elections Amendment Bill (2006) also included provisions to allow Polling Place Managers to confiscate material being distributed that had not been registered by the Electoral Commissioner. I would argue that the limitation of access included in section 151G (12A) in fact makes it harder to police the distribution of unregistered material. Section 151G (12A) does not permit voters or scrutineers to view the registered material in polling places, making it impossible for anyone but the Polling Place manager to know what is officially registered.

Party workers can only know what is officially registered by visiting the office of the Returning Officer, a trip that will be impractical, especially in rural seats.

If all material were made available for public access once registered, including by the media and other parties, then the administration of polling places would be greatly improved. Party workers would arrive at polling places with knowledge of what material was allowed to be distributed, both by themselves and by other candidates and parties.

Section 151G (12A) specifically prevents the public, the media and other parties from finding out the content of election material that is certified by the Electoral Commissioner. It reduces the transparency of the electoral process and also raises doubts in the public eye that something untoward is going on with preference deals. Rather than improve the regulation of election material outside polling places, secrecy may in fact create more dispute as candidate and party workers find themselves unable to confirm what material can be distributed.

In line with Electoral Acts in other states, Section 151G (12A) should be amended so that once registered, all election material should be publicly available.

Problems with Preference Counts by Polling Place

At the 2007 election, the NSW Electoral Commission greatly improved its provision of data to the media. There were some difficulties created by the specifications and the manner in which the data was made available. In particular, the Electoral Commission provided a file with multiple totals of votes by booth dependant on the stage of the count. However, these are issues that should be resolved by direct discussion between the Media and the Electoral Commission before the next election.

However, one problem that did arise concerned the provision of preference counts after election night. This was the first election where the Electoral Commission provided progressive post-election counts, and also where the ABC continued to take the feed and update its results site. This revealed problems with the totals provided that can be explained by the following results for the Speers Point booth in the electorate of Lake Macquarie.

Comparison of Election Night and Check Count Primary Votes – Speers Point, Lake Macquarie

Candidate	Election Night	Check Count	Change
Pritchard (GRN)	124	125	+1
Hunter (ALP)	929	931	+2
Piper (IND)	715	718	+3
Morgan (CDP)	47	47	..
Hodge (AFI)	30	31	+1
Paxinos (LIB)	314	316	+2
Notional Preference Count			
Hunter (ALP)	985		
Piper (IND)	959		

On election night, media organisations were provided with the primary and preference counts in the first column of the table. After the Sunday Check-count, the primary votes in the second column were provided in the file. However, the preference counts were not check counted. The totals provided after the election were the updated total of primary votes, including the check-count totals and counted declaration votes, plus a progressive preference count based on the election night count, but the only updated preference counts were those obtained from the declaration vote count.

Because the preference counts were not check counted, small errors found in the check-count were not reflected in the preference counts provided after election day. This problem is still reflected in the data file of election results provided by the Electoral Commission. The Commission's data set is of a completely checked primary count, plus an unchecked preference count from election night.

I would not recommend that the preference counts be re-done in every polling place across the state. There is a significant cost in having to re-count the preferences in every booth. However, I would recommend that where it is evident on election night that the result in an electorate will be close, as it was in Lake Macquarie at the 2007 election, then the polling place preference counts should be checked counted. This will ensure that accurate counts are provided in the post election period, and that the totals will not be substantially different from those released after the final distribution of preferences.

It is these errors in the election night preference count that are responsible for discrepancies in the table of two-candidate preferred counts published on pages 99-100 of the Electoral Commission's election report. The two-party preferred totals for the 72 districts that finished as contests between Labor and Coalition candidates have been derived from the data file of election night booth counts, complete with their inaccuracies. The table should have used the actual distribution of preferences for these 72 districts.

A table that uses the actual preference counts can be found on pages 32-33 of my publication "2007 New South wales Election: Final Analysis (Parliamentary Library Research service Background Paper No 1/08). This publication also uses the Notional Distribution forms to analyse preference flows at the 2007 election.

I should stress that none of the matters I raise above affect the accuracy of the final count in any district. The table of state-wide two-party preferred counts is not an 'official' result, merely a table provided for information purposes. There are only minor differences between this table and one derived from the actual preference counts and none of these alter the election result.

Timing Problems with the Issue of Writs

When fixed terms parliaments were introduced ahead of the 1995 election, a campaign period of just three weeks was adopted. This is the shortest time period of any jurisdiction in Australia. Every other state has a campaign period that allows three weeks between the close of nominations and polling day. New South Wales has three weeks as the maximum period of the campaign from issue of writ to polling day.

This problem is made worse when Section 68 of the Parliamentary Electorates and Elections Act specifies up to four days for the issue of the writ after the dissolution. Section 68 is a provision that was in place before the introduction of fixed term Parliaments. It is a provision that forces the issue of a writ in the case where a Parliament expires after serving a full term. The last time this occurred under a variable term parliament was in 1925.

Since the introduction of fixed term parliaments, the Constitution has had a fixed date for dissolution and a fixed date for polling day, but Section 68 means it does not have a fixed date for the issue of the writ. If the full 4 days are used, this means that only 19 days are allowed for the election campaign.

In 1999, this minimum period almost caused extreme difficulties for the Electoral Office. The massive size of the Legislative Council ballot paper caused problems with printing and distribution that came close to delaying the start of pre-poll voting and the issue of postal ballot papers.

In 2003, the government issued the writ the same day as the parliament was dissolved. This was a surprise to most observers, and also I understand, the Electoral Office. In 2007 the government reverted to issuing the writ on the Monday after the dissolution.

In a system of fixed parliamentary terms, I see no reasons why the Parliamentary Electorates and Elections Act should not specify that the writ should be issued on the same day as the Legislative Assembly is dissolved. If seems ridiculous that in a system of fixed term parliaments, the Electoral Commission cannot know when to call for nominations.

With political parties and candidates actively encouraging voters to use postal votes, uncertainty over the date for the issue of a writ can only make it harder for the Electoral Commission to deal with the flood of postal vote applications than if they knew the date.